

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	4:05CR3080
)	
v.)	
)	
THOMAS NEAL WRIGHT,)	REPORT, RECOMMENDATION,
)	AND ORDER
Defendant.)	
)	

The defendant has moved to suppress physical evidence obtained as a result of a June 2, 2005 traffic stop and subsequent search of his vehicle. Filing 19. He claims:

- The traffic stop was illegal;
- The defendant was unlawfully detained following the traffic stop; and
- The vehicle search was conducted without consent.

The defendant further claims that any statements made to law enforcement officers were derived from the unlawful search, seizure and arrest of the defendant, and therefore are inadmissible under the Fourth Amendment.¹

An evidentiary hearing was held on October 28, 2005 and November 1, 2005, and additional evidence was received on December 27, 2005. The parties filed post-hearing briefs, and the case is now fully submitted. Based on the evidence, I conclude the motion to suppress should be denied.

¹The defendant's motion also requests suppression of evidence and statements obtained in violation of the defendant's rights under the Fifth and Sixth Amendments, but his briefs address only alleged Fourth Amendment violations. Accordingly, any claim for suppression based on either the Fifth or Sixth Amendment is deemed abandoned.

FACTUAL FINDINGS

On June 2, 2005 Nebraska State Patrol Troopers Bradley Hand and Jason Probasco conducted a selective enforcement operation at the Phillips interchange of Interstate 80 in Hamilton County, Nebraska. Troopers Hand and Probasco are experienced road troopers who have both been certified by the Nebraska Law Enforcement Training Center.

The Phillips interchange is located at mile marker 318. Exit 314, the exit for South Locust Street, Grand Island, Nebraska, is the first exit west of the Phillips interchange. Exit 312 provides direct access to Highway 281, and several gas stations, motels, and eating establishments are located at this exit. A rest area is located at marker 315 for eastbound interstate traffic.

Interstate 80 near the Phillips interchange has two eastbound lanes. The Phillips interchange has an eastbound exit ramp that accesses County Road B, a north/south roadway which crosses the interstate. A stop sign is located at the junction of the eastbound exit ramp and County Road B. To the north, County Road B is also Nebraska Highway 2, which joins with the interstate at this location; to the south, County Road B becomes gravel-surfaced approximately 200 yards south of the interstate and near the access road for a KOA Campground on the east side of County Road B. A residence is located on the west side of County Road B south of the interstate. The town of Phillips is approximately four miles north and six miles east of the interchange. Other than the KOA campground, there are no businesses or signs for businesses at or near the Phillips interchange.

At approximately 5:30 p.m. on June 2, 2005, Troopers Hand and Probasco set up a ruse checkpoint at the Phillips interchange. NSP has no written procedure and offers primarily on-the-job training for setting up ruse checkpoints, but both officers had conducted or assisted with several ruse checkpoint operations in the past. In this case Trooper Hand posted two signs west of the eastbound exit ramp; the first sign, located approximately 600 feet from the exit, stated "Drug Dog in Use," and the second sign, located approximately 200 feet from the exit, stated "State Patrol Checkpoint Ahead." These signs, placed on the driving lane side of the interstate, were approximately 32-by-32 inches in size and had three-inch lettering. Adjacent to each sign was a two-and-a-half foot tall orange traffic cone and an 18-inch square red flag. See exhibit 101 (Scott videotape) at 17:02. Trooper Probasco's patrol vehicle was parked at the underpass of the interchange with its overhead and strobe lights activated.

Troopers Probasco and Hand exited the interstate in Trooper Hand's patrol vehicle and parked near an abandoned gas station located south of the interstate and east of County Road B. The patrol vehicle was parked on the northeast side of the abandoned gas station, facing northwest, with the front half of the vehicle visible to those exiting on the eastbound exit ramp. The officers' location was approximately seventy-five yards from the stop sign at the end of the eastbound exit ramp.

From their position within the patrol vehicle, the officers watched as motorists exited the interstate. Trooper Probasco watched with his naked eye, while Trooper Hand used binoculars to look for out-of-state licence plates, and to see whether the

exiting motorists appeared to be looking toward the interstate in search of a checkpoint.

At approximately 6:00 p.m. the troopers observed a 2002 gold Dodge Ram diesel pickup approach the eastbound exit ramp stop sign. The officers testified that the vehicle slowed, but it did not completely stop at the stop sign before turning south on County Road B. With his binoculars, Trooper Hand also noticed the vehicle had Nevada license plates.

The defendant argues the troopers' testimony concerning defendant's failure to stop at the stop sign is not credible, in part because the officers also claim the defendant signaled a right-hand turn by activating the vehicle's blinker, but the right-side blinker of the pickup was not functional at the time of this traffic stop. In support of defendant's claim, Craig Sutton testified that the right turn signal on the pickup was broken before June 2, 2005, was not repaired, and is still not working. He claims the signal was broken when an employee was backing up the pickup and the attached trailer jackknifed into the vehicle's right-hand bumper and taillight area. I do not find the testimony of Mr. Sutton credible. Mr. Sutton is employed by the defendant to perform, among other things, maintenance on vehicles used in the defendant's business, Wright Angle Sets and Staging. Mr. Sutton will therefore likely become unemployed should the defendant be convicted. Moreover, if the right blinker on the pickup remains non-functional to date, physical or testimonial evidence to that effect, and explaining the reason the blinker is not functioning and perhaps when that problem began, should have been available from an unbiased source.

I therefore conclude the defendant failed to stop at the stop sign before turning south on County Road B. After turning south, the pickup passed the KOA campground and the first county road intersection south of the interstate. The pickup began to slow down near a farmstead about a half mile south of the KOA Campground. The officers found it very unusual that a Nevada vehicle would exit the interstate at this location and not enter the KOA Campground. Trooper Hand activated his lights and initiated a traffic stop.

When working together at a ruse checkpoint operation, Troopers Hand and Probasco alternated contacting stopped motorists. When they witnessed the gold Dodge Ram pickup failing to stop at the stop sign, it was Trooper Probasco's turn to contact the driver of the pickup. Since the officers were using Trooper Hand's patrol vehicle to initiate the stop, and his body microphone was set to the frequency of the in-car camera, Trooper Hand accompanied Trooper Probasco to the vehicle to record the contact between Trooper Probasco and the defendant. However, the combined effect of the pickup's loud diesel engine, loud radio, and the distance between Trooper Hand's microphone and the conversation with the defendant rendered the initial contact with the defendant at the vehicle almost entirely inaudible on the videotape of this stop. See exhibit 1.

Trooper Probasco advised the defendant that his pickup was stopped for failing to stop at the stop sign. The officer asked the defendant to produce his driver's license and vehicle registration. The defendant handed the officer his Nevada driver's license which identified him as Thomas Neal Wright, a fifty-five year old male who resided in Las Vegas. The defendant began searching the glove compartment of the vehicle for the

registration. As he did so, both officers noted the defendant's hands were shaking "extremely bad." Trooper Probasco also noted that the defendant's voice quivered as if he were very nervous. The officer asked the defendant why he exited the interstate at this location, and the defendant explained he was very tired and was looking for a place to rest. Trooper Probasco asked why the defendant did not stop at the KOA Campground, and the defendant responded that he did not have any camping equipment and saw no buildings. Trooper Probasco stated that the registration need not be found and could be confirmed by radio instead, but the defendant kept looking through the papers in the glove compartment. As the defendant continued to search for the vehicle registration, the officer repeated that the registration could be checked by radio and asked the defendant to come back to the patrol vehicle so the officer could complete a warning ticket for the stop sign violation.

The officers observed the defendant's pickup bed and noticed some heavy equipment and a rolled up carpet, all of which was wrapped in plastic. As the defendant was walking toward the patrol vehicle, Trooper Hand asked about the contents of the pickup bed. The defendant responded that the equipment was stage equipment for a show he was setting up at the Holiday Inn Express near the Mall of America.

Trooper Probasco sat in the patrol vehicle with the defendant, who was located in passenger front seat. Trooper Hand stood outside the vehicle. Trooper Probasco contacted dispatch to check the defendant's driver's license and criminal history, and the vehicle's registration. Dispatch later advised that the defendant's driver's license was valid, the vehicle was registered to the defendant, and the defendant had a criminal

history of burglary, but was not the subject of any outstanding warrant.

While seated in the patrol vehicle, Trooper Probasco again asked the defendant about the equipment in the pickup bed.² The defendant stated he was coming from Las Vegas and heading to Minneapolis to the Mall of America to set up a stage for a show. When asked why he exited onto County Road B, the defendant stated he was looking for a place to pull off, park, and sleep, and though he was hoping to stop in Omaha to rest, he was extremely tired and needed to stop now. The defendant did not appear to be under the influence of drugs or alcohol.

Based on what he had learned thus far, Trooper Probasco suspected the defendant was transporting contraband. The defendant had Nevada license plates, did not claim to be looking for a local address, and had exited the interstate at a location with no businesses; the defendant chose to exit the interstate at a location where "drug checkpoint" signs had been placed; his stated reason for doing so was to get some rest, but no gas station, hotel, or other type of business, and no signs advertising such businesses were located at the Phillips interchange, and within the last ten miles, the defendant had passed two Grand Island exits (one of which had several motels) an interstate rest area, and the KOA Campground on County Road B; the amount and type of equipment in the pickup bed (a stage, a podium, and some carpet) was minimal and similar to the type most hotels have on hand, and it seemed quite unlikely anyone would

²The in-car microphone was located in or directed toward the back seat area, making the conversation between the officer and the defendant within the patrol car very muffled and impossible to hear on the videotape.

hire someone to deliver this equipment from Las Vegas to a Minnesota motel; the defendant's shaking hands and quivering voice indicated he was very nervous; the defendant was traveling from a high drug source state to Minneapolis, a known hub for drug distribution; and the defendant had a criminal history.

At approximately 6:12 p.m., Trooper Probasco advised Trooper Hand to call for a canine. Since no NSP canines were on duty that day, the Hall County canine handler, Deputy Sheriff Andrew Fairbanks, was contacted. At the time of this call, Deputy Sheriff Fairbanks and his canine partner, Bo, were located more than twelve miles from the site of this traffic stop. See exhibit 103. Trooper Probasco had not yet asked the defendant for consent to search the pickup, but wanted a dog handler to be en route to the area to expedite a canine sniff if the defendant refused consent. Trooper Hand, who remained outside the vehicle and had not heard or participated in the discussion between Trooper Probasco and the defendant, responded to Trooper Probasco's request, called for a drug dog, and stated the dog was needed because the stopped motorist had denied consent.

While Trooper Probasco continued to complete the warning ticket, he asked the defendant if there was contraband in the vehicle. The defendant denied having any type of drugs, specifically marijuana, or any kind of a pipe or drug paraphernalia. The officer explained the criminal activities often discovered by law enforcement through the use of ruse checkpoints. In response to the Trooper Probasco's questioning, the defendant stated he never saw the checkpoint signs posted on the interstate.

Trooper Probasco completed and handed the defendant a warning card, and returned his driver's license. The defendant exited the patrol vehicle and started walking toward his pickup. Troopers Probasco and Hand stood at the left front of the patrol car. When the defendant reached the left rear corner of his pickup, Trooper Probasco asked the defendant if he could ask a few questions. The defendant said, "Yes." Trooper Probasco again inquired as whether the defendant had any type of contraband in your vehicle, specifically mentioning types of drugs and stolen equipment. The defendant denied having any type of contraband in the vehicle.

Trooper Probasco asked, "May I search your vehicle and the contents therein?" The defendant said "yes" or "sure," pointed to his pickup and said, "go ahead and search." The defendant then said he wanted to leave that location and find a place at the campground to stay. Trooper Probasco responded that if the defendant agreed to a vehicle search, for officer safety reasons, the officers would perform it at the roadside rather than allowing the defendant to return to his vehicle and meet them at another location. The defendant now appeared unwilling to consent and said it might be best to bring a canine. Trooper Probasco asked if the defendant was still consenting to a search, and the defendant said, "No," explaining that he did not want the officers to search the vehicle. Trooper Probasco told the defendant he needed to wait for the canine to arrive, and with the defendant's consent, pat-searched the defendant for weapons.

The defendant continued to stand on the roadway. Trooper Hand explained to the defendant that based on the officers' experience with checkpoints, when someone exits the interstate rather than driving through the checkpoint, the officers suspect

the exiting motorist is doing something illegal. Hand stated that if the defendant had a marijuana pipe or a small bag of weed in the pickup, it was an infraction in Nebraska, much like a speeding ticket. The defendant looked down and to his right. Hand repeated that an infraction was basically a speeding ticket and if the defendant had anything illegal in the pickup, it would be simpler for all involved if he just told the officers. The defendant responded that he had just snorted a couple lines (of cocaine) and there was a rolled-up dollar bill in the vehicle. Hand asked where the rolled-up dollar bill was, and the defendant responded that it was between the seat and the console.

As Wright stood between the patrol vehicle and his pickup, Hand went to the defendant's vehicle and found a rolled dollar bill, with white residue on one end of the tube, between the passenger seat and a duffel bag located on the passenger floorboard. When Hand asked the defendant if other drugs were in the vehicle, the defendant stated he had a white bindle in the water. Hand went to the vehicle to look, saw a cooler in the vehicle, and asked the defendant if the white bindle was in the cooler. The defendant said, "Yes." Trooper Hand retrieved the white square bindle from the cooler.

Trooper Probasco patted the defendant down for officer safety, placed him in the patrol car, and began to write a citation for possession of drug paraphernalia. Trooper Hand contacted the dog handler who was en route and, intending to advise him not to come to the scene, stated the defendant had consented and had admitted to possession of paraphernalia. See exhibit 103. However, the dog handler continued to the scene, and when deployed, the dog indicated the presence of illegal drugs on the rear passenger side of the vehicle. Ex. 103.

Trooper Hand, along with Trooper Scott who had now arrived at the scene, began searching the vehicle. Inside the duffel bag on the passenger side floor they found a six-by-ten-by-two inch brick of what appeared to be illegal drugs. Trooper Scott placed the brick on the hood of the patrol car.

The defendant was placed under arrest but was not advised of his Miranda rights. While Trooper Probasco remained seated in the patrol vehicle with the defendant, Troopers Hand and Scott continued the vehicle search and found a black suitcase in the rear seat area. As Trooper Hand was carrying the suitcase to the back of the pickup, the defendant told Trooper Probasco, "They found the rest of it. That thing's full of cocaine." This statement was not made in response to any question or statement of any officer.

LEGAL ANALYSIS

The defendant claims the officers lacked probable cause to stop his vehicle because no traffic violation occurred, and that the traffic stop was simply a pretext to search the pickup because the officers believed a Nevada vehicle exiting the interstate where drug checkpoint signs were posted was likely transporting drugs. He further claims he was unlawfully detained during the course of this stop, did not consent to the warrantless search of his vehicle, and the search therefore violated the Fourth Amendment. He therefore argues that the drugs found within his pickup and any statements made thereafter must be suppressed as the fruits of the illegal traffic stop, detention, and search.

Even a minor traffic violation provides probable cause for a traffic stop. An officer's subjective belief that illegal drugs may also be present in the vehicle does not invalidate the stop. A traffic stop is not rendered invalid by the fact that it was a "mere pretext for a narcotics search." United States v. Williams, 429 F.3d 767, 771 (8th Cir. 2005)(citing Whren v. United States, 517 U.S. 806, 812-13 (1996); United States v. Barragan, 379 F.3d 524, 528 (8th Cir. 2004); United States v. Martinez, 358 F.3d 1005, 1009 (8th Cir. 2004)).

The defendant violated Neb. Rev. Stat. § 60-6,148 by failing to stop for at a stop sign. Even assuming the officers believed the defendant was transporting illegal drugs, and that their primary motivation was to stop a vehicle with Nevada license plates exiting the interstate in response to drug checkpoint signs, the troopers did not violate the defendant's Fourth Amendment rights when they stopped a vehicle for violating Nebraska law. "Any traffic stop is constitutional, no matter the officer's actual motive, so long as the officer had probable cause to believe that a traffic violation actually occurred." United States v. Long, 320 F.3d 795, 798 (8th Cir. 2003). Troopers Hand and Probasco probably pursued defendant's traffic violation because they suspected drug trafficking. However, "a law enforcement officer's ulterior motives in initiating contact with an individual (or his pursuit of the more general programmatic purposes of the operation) are irrelevant to the Fourth Amendment question when probable cause . . . exists." United States v. Williams, 359 F.3d 1019, 1021 (8th Cir. 2004). See also United States v. Martinez, 358 F.3d 1005, 1008 (8th cir. 2004).

The defendant claims he was unlawfully detained and subjected to questioning following the traffic stop. He argues that even if the traffic stop was valid, the troopers unlawfully extended it beyond the scope of writing a warning ticket for failing to stop at a stop sign.

After stopping a vehicle, an officer can check the driver's identification and vehicle registration, ask the driver to step out of his vehicle, and ask routine questions concerning the driver's destination and the purpose of his trip. Long, 320 F.3d 795; United States v. Ramos, 42 F.3d 1160, 1163 (8th Cir. 1994)(citing United States v. Barahona, 990 F.2d 412, 416 (8th Cir. 1993); United States v. Richards, 967 F.2d 1189, 1192-93 (8th Cir. 1992)). The officer may detain a vehicle occupant while performing the routine tasks of writing a citation, and completing computerized checks of a driver's license, vehicle registration, and the criminal histories of vehicle occupants. United States v. Fuse, 391 F.3d 924, 927 (8th Cir. 2004); United States v. White, 81 F.3d 775 (8th Cir. 1996).

I conclude that the initial questioning of the defendant during this traffic stop was reasonable. The officers asked for his driver's license and registration, and asked about the origin and destination of his trip. As to the purpose of his trip, the officers asked what he was hauling in the pickup bed, why he was traveling to the Minneapolis area, and why he diverted from that route by exiting the interstate at the Phillips interchange and turning south.

Based on the defendant's answers, and the officers' knowledge, experience, and observations, within the first five minutes of this traffic stop, the troopers suspected he was

engaged in illegal drug activity. They noticed the defendant was very nervous; was traveling from a drug source state to a drug distribution hub; claimed to be making a cross-country delivery of equipment to a motel, but the equipment in the pickup was minimal in amount and of a type ordinarily kept on hand at motels or, at very least, available locally; claimed to be exiting the interstate to get some rest but within the last ten miles, had passed exits with motels, an interstate rest area, and a campground; and had exited the interstate at a location with posted drug checkpoint signs but no actual or advertised businesses except for the campground. Although each of these factors alone "is susceptible of innocent explanation, and some factors are more probative than others," a "determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct." United States v. Arvizu, 534 U.S. 266, 277 (2002).

I conclude that, considered in the totality, the facts of this case establish that Troopers Hand and Probasco reasonably suspected the defendant was involved in criminal drug activity. see e.g. United States v. Blaylock, 421 F.3d 758, 769 (8th Cir. 2005)(finding reasonable suspicion where upon initial contact, passenger did not make eye contact with the officer; stated purpose of the trip was implausible; driver consented to a search but the passenger refused consent and changed his reason for doing so; and the passenger was fidgeting and squirming, and his hands were shaking, and when pointedly asked if there were illegal drugs in the vehicle, his eyebrow began twitching uncontrollably and his right arm began shaking); United States v. Fuse, 391 F.3d 924, 929 (8th Cir. 2004)(finding reasonable suspicion where vehicle had a strong odor of air freshener; the defendant had a criminal record; the car did not belong to its

occupants; the occupants were traveling from a "source state" for illegal narcotics; the explanation for the trip was unusual or implausible; the occupants were unusually nervous; and there was a mobile telephone and "NoDoz" in the car).

The defendant may be contending that Trooper Probasco violated the Fourth Amendment by asking the defendant, while seated in the patrol vehicle and before the warning ticket was completed, whether the defendant was transporting illegal drugs. When a defendant's responses to the officer's questions are inconsistent with known facts, a trooper's suspicions may be sufficiently raised to justify expanding the scope of the stop to ask additional, more intrusive, questions. United States v. Morgan, 270 F.3d 625, 631-32 (8th Cir. 2001); United States v. Edmisten, 208 F.3d 693, 694 (8th Cir. 2000); United States v. Ramos, 42 F.3d at 1163. Since the officer reasonably suspected the defendant was involved in illegal drug activity, he did not violate the Fourth Amendment by asking, during the course of the traffic stop, whether there were drugs in the defendant's vehicle.

The defendant claims that once the traffic stop was complete and the defendant's papers and driver's license returned, the troopers unreasonably detained the defendant by asking him additional questions as he walked to his vehicle. For purposes of determining whether a further detention was proper, returning the defendant's driver's license, delivering the warning citation, and allowing the defendant to exit the patrol vehicle does not effectively erase the objectively reasonable suspicions developed by a police officer during the traffic stop. Fuse, 391 F.3d at 929. Officers may continue to investigate for criminal

activity until their suspicions are dispelled. Id.; Long, 320 F.3d at 798.

In this case, Officer Probasco asked the defendant if he would answer a few more questions, and the defendant agreed. In response to questioning, the defendant again denied having drugs in his vehicle. The officers asked for consent to search the vehicle, which was initially granted and then denied. Although the defendant claims the officers unlawfully detained him following completion of the traffic stop to ask additional questions and for consent, "[l]aw enforcement officers do not violate the Fourth Amendment by asking a person for consent to search or other types of cooperation, even when they have no reason to suspect that person, 'provided they do not induce cooperation by coercive means.'" United States v. Yang, 345 F.3d 650, 654 (8th Cir. 2003)(quoting United States v. Drayton, 536 U.S. 194, 201 (2002)).

The question is whether a reasonable person in the same circumstance would have felt free to leave. United States v. Morgan, 270 F.3d 625, 630 (8th Cir. 2001). The court determines whether an encounter constitutes an unlawful detention or seizure on a case-by-case basis. There is no litmus test distinguishing a consensual encounter from a seizure, and the test, such as it is, is "necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." Michigan v. Chesternut, 486 U.S. 567, 573 (1988).

Some circumstances that inform the determination of whether a seizure took place include: officers positioning themselves in a way that limits the person's freedom of movement, . . . the presence of several officers, the display of weapons by officers,

physical touching, the use of language or intonation indicating compliance is necessary, the officer's retention of the person's property, or an officer's indication that the person is the focus of a particular investigation. . . .

United States v. Johnson, 326 F.3d 1018, 1021-22 (8th Cir. 2003). Although questions about drugs concern a sensitive topic, this questioning does not in itself create an inherently coercive environment. United States v. Morgan, 270 F.3d 625, 630 (8th Cir. 2001).

Considering the totality of this traffic stop, including the considerations set forth in Johnson, I conclude that a reasonable person in the defendant's position would have felt free to say, "No," and to continue on his way when the troopers asked if he would answer further questions. The defendant had received all his property from the trooper, and was walking to the vehicle when the question was asked. Neither trooper physically positioned himself to stop the defendant's return to his vehicle. No threats or promises were made, neither officer demanded the defendant's cooperation, and weapons were never drawn. The defendant is an English-speaking adult who did not appear to be under the influence of drugs or alcohol. Though the defendant was never told he could leave and refuse to answer questions, that fact does not establish that his conversation with the troopers was nonconsensual. United States v. Santos-Garcia, 313 F.3d 1073, 1078 (8th Cir. 2002)(citing Morgan, 270 F.3d at 630. Moreover, the defendant was walking to his vehicle, and apparently believed he was free to leave. Morgan, 270 F.3d at 630. Taking into account all the circumstances of this encounter, a reasonable person would have believed he was free to "ignore the police presence and go about his business." Michigan v. Chesternut, 486 U.S. 567, 569 (1988)). See Morgan, 270 F.3d

at 630 (holding that after the warning ticket was issued, and all property was returned to the driver, initiating a conversation with the driver on the roadway about drug interdiction was not an impermissible detention even though the driver had not been told she could leave and stated she did not subjectively feel free to leave).

This finding is reinforced by the defendant's response when asked for consent to search the vehicle. Though the defendant initially consented, when told he could not drive his vehicle from the scene of the stop until the search was complete, he revoked the consent. He was then told he would be detained until a drug dog arrived, and in response stated he would wait for the drug dog. There is no evidence the defendant's will was overborne by any police-dominated atmosphere.

Moreover, even if the further detention was a seizure, there was a reasonable articulable suspicion to justify it, so long as the length of detention was not unreasonable. See e.g. United States v. White, 42 F.3d 457, 460 (8th Cir. 1994)(finding delay of one hour and twenty minutes for arrival of drug dog reasonable); Bloomfield, 40 F.3d at 916-17 (one hour wait from time of stop to arrest, part of which was waiting for a drug dog, was reasonable).

While awaiting arrival of the drug dog, Trooper Hand engaged the defendant in further conversation, advising him that possession of small quantities of drugs or drug paraphernalia is only an infraction in Nebraska and if the defendant had such items, everyone would be better off if he just admitted that. The defendant responded by stating he had snorted cocaine through a rolled dollar while in the vehicle and that he possessed a

white bindle. When the defendant made these statements, he knew he was not free to leave and he had not been advised of his Miranda rights, but he was neither physically restrained by the officers nor in custody.³ The defendant was not coerced by promises, threats, or weapons to speak with the officers, the officers did not demand his cooperation, and the encounter occurred on an open public roadway adjacent to a farmstead. I conclude that the defendant was not coerced to speak with the officers in violation of his Fourth Amendment rights.

Once the defendant admitted to using cocaine in the vehicle and possessing drug paraphernalia, the officers had probable cause to search the vehicle. United States v. Caves, 890 F.2d 87, 90 (8th Cir. 1989)(Officers had probable cause to search an automobile for unused marijuana where the driver's person and breath smelled like burnt marijuana). "The warrantless search of a vehicle is constitutional pursuant to the 'automobile exception' to the warrant requirement, if law enforcement had probable cause to believe the vehicle contained contraband or other evidence of a crime before the search began." United States v. Castaneda, Doc. No. 05-1010 (8th Cir. February 24, 2006)(quoting United States v. Wells, 347 F.3d 280, 287 (8th Cir. 2003)). Accordingly, the nonconsensual search of the defendant's pickup did not violate the Fourth Amendment because the officers

³"No Miranda warning is necessary for persons detained for a Terry stop. . . . Thus, we reject as contrary to this controlling authority [the] broad contention that a person is in custody for Miranda purposes whenever a reasonable person would not feel free to leave. One is not free to leave a Terry stop until the completion of a reasonably brief investigation, which may include limited questioning. But most Terry stops do not trigger the detainee's Miranda rights." United States v. Pelayo-Ruelas, 345 F.3d 589, 592 (8th Cir. 2003)(internal citations omitted).

had probable cause to conduct a warrantless search of the vehicle.

Finally, discovering the evidence in the pickup was inevitable. Under the inevitable discovery doctrine, evidence that would have been discovered "through independent, lawful means should be admitted so that the prosecutor is put in the same, not worse, position as though the original illegality had not occurred." United States v. Madrid, 152 F.3d 1034, 1037-38 (8th Cir. 1998)(citing Nix v. Williams, 467 U.S. 431, 442-43 (1984)). In evaluating the evidence, the focus is on what the officers would likely have done had the unlawful search not occurred. The government must prove by a preponderance of the evidence: (1) that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct, and (2) that the government was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation. United States v. Villalba-Alvarado, 345 F.3d 1007, 1019-20 (8th Cir. 2003).

Deputy Sheriff Fairbanks and his canine partner, Bo, were summoned to the scene only twelve minutes after the defendant's vehicle was stopped. In requesting canine assistance when he reasonably suspected criminal activity, Trooper Probasco was clearly pursuing an independent and legal means of determining whether illegal drugs were present in the pickup bed. Had Troopers Hand and Probasco said nothing more to the defendant once the traffic stop was complete, they could have lawfully detained the defendant until the arrival of the drug dog which was already en route. Fuse, 391 F.3d at 929 (holding that the Fourth Amendment was not violated where reasonable suspicion

existed, the defendant refused consent to search his vehicle, and the defendant was detained until a drug dog arrived). When the drug dog arrived, he alerted several times on the pickup and indicated on the rear passenger side of the vehicle, where the suitcase of cocaine was found. Accordingly, despite the defendant's claim that he was unreasonably detained and questioned in violation of his Fourth Amendment rights, the evidence of cocaine located in the pickup bed should not be suppressed because it would have inevitably been discovered following the canine's indication. See Hammons, 152 F.3d at 1030 (assuming the defendant did not voluntarily consent to the officer opening an envelope located in the garment bag found in his vehicle trunk, the cocaine therein would have been inevitably discovered had a drug dog been called to the scene).

IT THEREFORE HEREBY IS RECOMMENDED to the Hon. Richard G. Kopf, Chief United States District Judge, pursuant to 28 U.S.C. §636(b)(1)(B), that the defendant's motion to suppress, filing 19, be denied.

The parties are notified that a failure to object to this recommendation in accordance with the local rules of practice may be held to be a waiver of any right to appeal the district judge's adoption of this recommendation.

IT FURTHER HEREBY IS ORDERED: Trial is set for 9:00 a.m. on April 17, 2006 for a duration of three trial days before the Honorable Richard G. Kopf. Jury selection will be at the commencement of trial.

DATED this 27th day of February, 2006.

BY THE COURT:

s/ *David L. Piester*

David L. Piester
United States Magistrate Judge